

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

VICTORIA THOMPSON, acting on
behalf of the late Russell
Gene Thompson,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

No. 2:22-CV-01459-JAM-JDP

**ORDER GRANTING MOTIONS TO
DISMISS**

The United States ("Defendant") moves this Court for an order dismissing several causes of action in Victoria Thompson's ("Plaintiff") First Amended Complaints for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. See Mot. to Dismiss ("First Mot."), ECF No. 13, Mot. to Dismiss ("Second Mot."), ECF No. 25. Plaintiff opposed the motions. See First Opp'n, ECF No. 14, Second Opp'n, ECF No. 27. Defendant replied. See First Reply, ECF No. 21, Second Reply, ECF No. 28.

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1 For the reasons set forth below, this Court GRANTS
2 Defendant's motions.¹

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4 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

5 Plaintiff is the surviving spouse of Russell Gene Thompson
6 ("Decedent"), who was a patient at the Veterans Affairs-Martinez
7 Outpatient Clinic from March 19, 2021 to May 7, 2021 and the
8 Veterans Affairs-San Francisco Medical Center from August 19,
9 2021 to October 6, 2021. First Amended Complaint ("Second FAC"),
10 ECF No. 23, ¶ 19, First Amended Complaint ("First FAC"), ECF
11 No. 7, ¶ 16. Both facilities and their employees operate under
12 the direction and supervision of Defendant's Department of
13 Veterans Affairs. Second FAC ¶¶ 9-10. Plaintiff alleges that
14 Decedent entered the Martinez facility suffering from various
15 wounds and coronary complications. Id. ¶ 20. During Decedent's
16 stay at the Martinez facility, Plaintiff alleges that Decedent:
17 (1) fell twice; (2) lost approximately 9.5 pounds; (3) had not
18 been regularly fed; (4) had open wounds that worsened during his
19 stay; and (5) was transferred to another facility twice because
20 of medical decline. Id. ¶¶ 23-38.

21 Plaintiff alleges that these incidents were the result of
22 medical malpractice by the Martinez facility's staff and filed
23 one of the operative FACs in Victoria Thompson v. United States
24 of America, Case No. 2:23-CV-00403-JAM-JDP, which the Court later
25 consolidated into the instant case. See Order Consolidating
26 Cases, ECF No. 22. Plaintiff brings eleven claims under the

27 ¹ This motion was determined to be suitable for decision without
28 oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled
for May 9, 2023.

1 Second FAC pursuant to the Federal Torts Claims Act (FTCA),
2 alleging ten counts of negligence and one violation of
3 California's Elder Abuse and Dependent Adult Civil Protection Act
4 ("Elder Abuse Act"). See Second FAC. On March 28, 2023,
5 Defendant filed its motion to dismiss the Second FAC, arguing
6 that (1) Plaintiff's Elder Abuse Act claim should be dismissed
7 for failure to state a claim upon which relief can be granted
8 under Federal Rule of Civil Procedure (FRCP) 12(b)(6) and
9 (2) Plaintiff is not eligible to receive punitive damages or
10 prejudgment interest under the FTCA. Second Mot. at 4.
11 Plaintiff opposed the motion. See Second Opp'n. Defendant
12 replied. See Second Reply.

13 On November 2, 2022, Plaintiff filed the First FAC, relating
14 to Decedent's treatment at the Veterans Affairs-San Francisco
15 Medical Center from August 19, 2021 to October 6, 2021. See
16 First FAC. Decedent entered the facility and was diagnosed with
17 mental health complications. Id. ¶ 17. Plaintiff alleges that
18 during Decedent's time at the facility: (1) Decedent developed
19 multiple open skin sores that caused him increased pain; and
20 (2) medical staff turned off his heart defibrillator. Id. ¶¶ 27-
21 30. Decedent died at the San Francisco facility on October 6,
22 2021. Id. ¶ 18. Plaintiff further alleges that medical staff
23 impeded her access to Decedent's body, which she was not able to
24 retrieve for burial for more than two weeks after his death. Id.
25 ¶¶ 33-36.

26 Plaintiff brings the following ten claims under the First
27 FAC pursuant to the FTCA: (1) lack of informed consent;
28 (2) murder; (3) negligence in the detention of human remains in

1 violation of California Health and Safety Code § 7053;
2 (4) negligence by medical staff relating to Decedent's skin
3 sores; (5) negligence by medical staff relating to Decedent's
4 pain from the skin sores; (6) negligence relating to Decedent's
5 limited mobility; (7) negligence by the medical center relating
6 to Decedent's skin sores; (8) negligence by the medical center
7 relating to Decedent's pain from the skin sores; (9) negligent
8 conduct in violation of the Elder Abuse Act; and (10) wrongful
9 death. See First FAC. On February 6, 2023, Defendant filed its
10 motion to dismiss the First FAC, arguing that Plaintiff's second,
11 third, and ninth claims should be dismissed under FRCP 12(b)(1)
12 and 12(b)(6) and that Plaintiff was not entitled to punitive
13 damages or prejudgment interest. First Mot. at 5-7. Plaintiff
14 opposed the motion. See First Opp'n. Defendant replied. See
15 First Reply.

16 17 II. OPINION

18 A. Legal Standard

19 Dismissal is appropriate under FRCP 12(b)(1) when the Court
20 lacks subject matter jurisdiction over the claim. Fed. R. Civ.
21 P. 12(b)(1). The motion may either (1) dispute the sufficiency
22 of the pleadings to establish federal jurisdiction or (2) allege
23 a lack of federal jurisdiction despite the formal sufficiency of
24 the complaint. Blue Lake Rancheria v. Morgenstern, No. 2:11-CV-
25 01124 JAM, 2011 WL 6100845, at *2 (E.D. Cal. Dec. 6, 2011).
26 Standing challenges are also properly plead under FRCP 12(b)(1).
27 Id. When a defendant brings a motion to dismiss for lack of
28 subject matter jurisdiction pursuant to Rule 12(b)(1), the

1 plaintiff has the burden of establishing subject matter
2 jurisdiction. See Rattlesnake Coalition v. United States Envtl.
3 Protection Agency, 509 F.3d 1095, 1102, n. 1 (9th Cir. 2007).

4 In considering a motion to dismiss for failure to state a
5 claim upon which relief can be granted under FRCP 12(b)(6), the
6 Court must accept the allegations in the complaint as true and
7 draw all reasonable inferences in favor of Plaintiff. Moss v.
8 U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009) (citing
9 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). The complaint must
10 possess more than "a formulaic recitation of the elements of a
11 cause of action;" it must contain non-conclusory, factual
12 allegations sufficient "to raise a right to relief above the
13 speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S.
14 544, 554 (2007).

15 B. Analysis

16 1. First Motion to Dismiss

17 a. Counts Two and Three

18 Defendant contends that Plaintiff's second and third causes
19 of action in the First FAC for murder and negligence in the
20 detention of human remains must be dismissed on (1) sovereign
21 immunity and (2) standing grounds. First Mot. at 5. Defendant
22 first argues that, although Defendant has waived sovereign
23 immunity for certain tort claims under the FTCA, it has not
24 waived immunity for criminal claims; Plaintiff's second and third
25 claims both constitute criminal causes of action with criminal
26 penalties, so they are barred by sovereign immunity. Id.
27 Defendant further notes that Plaintiff lacks standing to pursue
28 these criminal claims because neither creates a private cause of

1 action under which Plaintiff can litigate as a private citizen;
2 that right is exclusively reserved to prosecutors, absent express
3 statutory provisions that state otherwise. Id. at 6.

4 With respect to Plaintiff's murder claim, Plaintiff first
5 states that the claim can be amended to negligence if the Court
6 grants Defendant's motion. First Opp'n ¶ 24, 29. Plaintiff then
7 argues that a state murder charge can be tried against Defendant
8 in a civil trial and asks the Court to expand the jurisdiction of
9 the FTCA to include harms beyond torts. Id. ¶¶ 27-28. With
10 respect to Plaintiff's negligence in the detention of human
11 remains claim, Plaintiff first argues that Defendant is negligent
12 *per se* because there is a rebuttable presumption of negligence if
13 there is a violation of a statute, which occurred in the instant
14 case. Id. ¶ 30. Plaintiff also claims that California Health
15 and Safety Code § 7053 does not exclusively fall under the state
16 penal code and allows for both civil and criminal suits. Id.
17 ¶¶ 31-32. Plaintiff further argues, in the alternative, that
18 Plaintiff can also prove the elements of traditional negligence
19 against Defendant for its alleged violation of § 7053. Id. ¶¶ 34-
20 37.

21 The Court finds Defendant's sovereign immunity argument
22 persuasive and dispositive. The United States is "immune from
23 suit save as it consents to be sued, and the terms of its consent
24 to be sued in any court define the [C]ourt's" subject matter
25 jurisdiction. United States v. Sherwood, 312 U.S. 584, 586
26 (1941). Absent a statutory waiver of sovereign immunity, an
27 action against the United States must be dismissed. Elias v.
28 Connett, 908 F.2d 521, 527 (9th Cir. 1990). Plaintiff has

1 brought her claims under the FTCA and has cited to no other
2 statutory waivers of sovereign immunity by Defendant under which
3 her claims can be brought. The FTCA provides a limited waiver of
4 the sovereign immunity of Defendant for torts committed by
5 federal employees acting within the scope of their employment.
6 Valdez v. United States, 56 F.3d 1177, 1179 (9th Cir. 1995).
7 While Plaintiff contends that her second and third claims fall
8 under the FTCA, the Court disagrees. Plaintiff has provided no
9 persuasive or controlling authority that would permit this Court
10 to qualify either claim as a tort and exercise jurisdiction over
11 them in accordance with the FTCA. To the contrary, the Court
12 finds that Plaintiff's second and third claims are criminal
13 felony and misdemeanor offenses, respectively, against which
14 Defendant is immune from suit. Therefore, the Court dismisses
15 these claims with prejudice.

16 b. Count Nine

17 Defendant argues that Plaintiff's ninth cause of action
18 alleging a violation of the Elder Abuse Act should be dismissed
19 for failure to state a claim upon which relief can be granted;
20 Defendant claims that Plaintiff simply alleges the negligent
21 provision of care by Decedent's medical staff, which does not
22 meet the Elder Abuse Act's requisite standard of "egregious"
23 conduct. First Mot. at 6-7. Plaintiff responds that Defendant's
24 violation of the Elder Abuse Act constitutes both negligence *per*
25 *se* and traditional negligence. First Opp'n ¶¶ 38, 44-47.
26 Plaintiff also references case law to support her contention that
27 Elder Abuse Act violations can be civilly litigated, even when
28 arbitration agreements are involved. Id. ¶¶ 41-43.

1 The Court finds Defendant's argument persuasive. Plaintiff
2 alleges that Defendant's staff at Veterans Affairs-San Francisco
3 Medical Center violated the Elder Abuse Act by neglecting
4 Decedent's medical needs and depriving him of medically necessary
5 services. First FAC ¶¶ 131-35. The Elder Abuse Act requires a
6 plaintiff to prove by clear and convincing evidence that a
7 defendant is "liable for physical abuse, neglect, or financial
8 abuse (as these terms are defined in the Act), and that the
9 defendant has been guilty of 'recklessness, oppression, fraud, or
10 malice' in the commission of such abuse." Covenant Care, Inc. v.
11 Superior Ct., 32 Cal. 4th 771, 779 (2004) (citing Cal. Welf. &
12 Inst. Code, § 15657). Abuse includes "physical abuse, neglect,
13 financial abuse, abandonment, isolation, abduction, or other
14 treatment with resulting physical harm or pain or mental
15 suffering" or the "deprivation of care by a care custodian of
16 goods or services that are necessary to avoid physical harm or
17 mental suffering." Cal. Welf. & Inst. Code, § 15610.07. Neglect
18 requires a showing that a defendant: (1) was responsible for
19 meeting the basic needs of the elder or dependent; (2) knew of
20 conditions that made the elder or dependent unable to tend to
21 their own basic needs; and (3) denied or withheld goods or
22 services. Carter v. Prime Healthcare Paradise Valley LLC, 198
23 Cal. App. 4th 396, 406 (2011).

24 A plaintiff must demonstrate a level of culpability beyond
25 simple, gross, or professional negligence. Id. at 405, 408.
26 Oppression, fraud, and malice involve "intentional, willful, or
27 conscious wrongdoing of a despicable or injurious nature," while
28 recklessness involves "deliberate disregard of the high degree of

1 probability that an injury will occur.” Id. The Ninth Circuit
2 has expressed that the Elder Abuse Act concerns the complete
3 “failure to provide medical care,” including “egregious” conduct
4 such as repeated or flagrant failures to provide care. Flores by
5 & through Clark v. United States, 780 F. App'x 420, 422 (9th Cir.
6 2019). The Court finds that Plaintiff has failed to allege that
7 the Veterans Affairs-San Francisco Medical Center staff engaged
8 in any behavior consistent with recklessness, oppression, fraud,
9 or malice. Plaintiff has consistently stated that she is
10 asserting negligent misconduct by the medical staff in their care
11 of Decedent, which is insufficient to maintain this cause of
12 action. The references to cardiology staff turning off the heart
13 defibrillator used on Decedent, the presence of skin sores on
14 Decedent's body, and Decedent experiencing pain from those sores
15 fail to sufficiently demonstrate the state of mind of the medical
16 staff, such that the right to relief does not rise beyond the
17 speculative level. In the absence of the non-conclusory, factual
18 allegations necessary to sustain this claim, the Court dismisses
19 this claim without prejudice.

20 2. Second Motion to Dismiss

21 Defendant's argument against Plaintiff's eleventh cause of
22 action in the Second FAC alleging a violation of the Elder Abuse
23 Act is identical to its argument towards the First FAC; Defendant
24 argues that this claim should be dismissed for failure to state a
25 claim upon which relief can be granted because Plaintiff has only
26 alleged the negligent provision of care towards Decedent by the
27 Veterans Affairs-Martinez Outpatient Clinic staff. Second Mot.
28 at 4. Plaintiff responds that Defendant is liable for an Elder

1 Abuse Act violation because Defendant's staff at the Martinez
2 clinic: (1) violated the Elder Abuse Act's provisions; (2) were
3 negligent *per se* in their treatment of Decedent; and (3) were
4 traditionally negligent under tort law. Second Opp'n ¶ 54.
5 Plaintiff outlines Decedent's alleged mistreatment at the clinic,
6 namely that Decedent: (1) fell twice; (2) lost approximately ten
7 pounds; (3) experienced worsening skin sores; (4) experienced
8 more general pain and discomfort; and (5) was sent to different
9 hospitals twice. Id. ¶ 55.

10 Consistent with its ruling in Defendant's favor on
11 Plaintiff's first Elder Abuse Act claim, the Court, again, finds
12 Defendant's argument carries the day. As discussed above, the
13 Ninth Circuit has expressed that the Elder Abuse Act concerns the
14 complete "failure to provide medical care," including "egregious"
15 conduct such as repeated or flagrant failures to provide care.
16 Flores, 780 F. App'x at 422. The Court finds that Plaintiff has
17 failed to allege that the Veterans Affairs-Martinez Outpatient
18 Clinic staff completely failed to provide medical care or engaged
19 in any behavior consistent with recklessness, oppression, fraud,
20 or malice. As with her other Elder Abuse Act claim, Plaintiff
21 continues to assert merely negligent misconduct by the medical
22 staff in their care of Decedent, which is insufficient to
23 maintain this cause of action. In the absence of the non-
24 conclusory, factual allegations necessary to sustain this claim,
25 the Court dismisses this claim without prejudice.

26 3. Remaining Issues

27 In both of its motions to dismiss, Defendant asks the Court
28 to dismiss Plaintiff's prayers for punitive damages and

1 prejudgment interest, arguing that the FTCA does not allow such
2 damages against Defendant. First Mot. at 6-7, Second Mot. at 4.
3 Plaintiff responds that punitive damages and other enhanced
4 remedies are permitted under California state law and are
5 routinely awarded in actions involving the Elder Abuse Act.
6 First Opp'n ¶¶ 48-53. The Court finds Defendant to have the
7 better argument.

8 Punitive damages and prejudgment interest are remedies, not
9 claims, so they cannot be dismissed for failure to state a claim
10 upon which relief can be granted. Martinez v. Optimus Props.,
11 LLC, No. 2:16-cv-08598-SVW-MRW, 2017 U.S. Dist. LEXIS 135395, at
12 *25 (C.D. Cal. Mar. 14, 2017). Such a motion will be construed
13 by the Court as a motion to strike the requests and will only be
14 granted "if it is clear from the face of the complaint that a
15 plaintiff is not entitled to such relief." Id. at *26.

16 Plaintiff has brought all of her claims under the FTCA, which
17 completely precludes liability against Defendant for prejudgment
18 interest and punitive damages; even if local law allows for
19 punitive damages or awards greater than compensatory damages,
20 only compensatory damages may be awarded. 28 U.S.C. § 2674,
21 Felder v. United States, 543 F.2d 657, 669 (9th Cir. 1976).

22 Thus, the Court finds that Plaintiff is not entitled to punitive
23 damages and prejudgment interest, and grants Defendant's motions
24 to strike Plaintiff's requests for punitive damages and
25 prejudgment interest in the First and Second FAC.

26 27 III. ORDER

28 For the reasons set forth above, the Court GRANTS

1 Defendant's motions to dismiss and strike. Claims two and three
2 in the First FAC are DISMISSED WITH PREJUDICE. However, because
3 amendment may not be futile on the Elder Abuse Act claims, this
4 Court grants Plaintiff leave to amend these claims. Eminence
5 Cap., LLC v. Aspeon, Inc., 316 F.3d 1048, 1051-52 (9th Cir.
6 2003).

7 If Plaintiff elects to amend her complaints, she shall
8 consolidate the First and Second First Amended Complaints into
9 one Second Amended Complaint to be filed within twenty days of
10 this Order. Defendant's responsive pleading is due twenty days
11 thereafter.

12 IT IS SO ORDERED.

13 Dated: June 9, 2023

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16 JOHN A. MENDEZ
17 SENIOR UNITED STATES DISTRICT JUDGE
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